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No. 853

In the
Supreme Court of the United States
OCTOBER TERM, 1944

L. C. AKINS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Certiorari from the Court of Criminal Appeals of Texas.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

The opinion of the Court of Criminal Appeals of Texas in this cause is reported in *Akins v. State*, 182 S. W. Rep. (2d) pp. 723-724.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

FIRST

Your petitioner is a negro, a member of the African race. In the formation of the grand jury that returned the bill of indictment herein on which he was tried and convicted in this cause in the State court and given a sentence of death, this defendant and his race were discrimi-

nated against on account of their race and color in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That thereby he was denied the equal protection of the law.

SECOND

That the tribunal before which he was tried and convicted in this cause had no legal power, authority or jurisdiction to try this cause, and was not a legally constituted court, and that by reason thereof this petitioner is being deprived of his life without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Your petitioner, who is an American citizen and a negro, a member of the African race, was indicted by a purported grand jury in the Criminal District Court of Dallas County, Texas, charged with the offense of murder. He duly filed, in limine, in said court his motion to quash the indictment on the ground that in the formation of the grand jury that returned same he had been discriminated against on account of his race and color; had been denied due process of law, and the equal protection of the law as guaranteed him under the Fourteenth Amendment, Section 1, of the Constitution of the United States. That the grand jury that returned said indictment was selected by the jury commissioners who drew the grand jury panel from which the grand jury was selected, and said grand jury commis-

sioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member. That there was a large number of negroes and members of the negro or African race in Dallas County, Texas, who possessed the legal qualifications of grand jurors, but said grand jury commissioners deliberately, intentionally and purposely excluded all members of said race from said grand jury panel except one. That said manner of selecting said grand jury panel in fact discriminated against your petitioner and his race on account of their race and color, and was an artful and tactful evasion of the petitioner's constitutional rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 19 to 43.)

In support of said motion to quash said indictment testimony was taken before the court which showed that said grand jury commissioners in the selection of the said grand jury panel purposely and intentionally limited the number of members of the negro race on said panel to one, and that they would not consider putting more than one negro on the grand jury panel. (This will more fully appear from petitioner's Bill of Exception No. 1 as contained in the record, R. 19 to 43.) Thereupon the court overruled said motion and petitioner duly reserved his exception to said ruling. (R. 43.)

The regularly and duly elected, qualified and acting judge of the Criminal District Court of Dallas County, Texas; Judge Grover C. Adams, had theretofore died, thereby creating a vacancy in the office of judge of said court, and the Governor of Texas not having filled said

vacancy, and no general election having intervened at which said vacancy had been filled, the Honorable A. R. Stout, the judge of the 40th Judicial District of Texas in and for Ellis County, Texas, appeared by virtue of an assignment by the presiding judge of the First Administrative Judicial District of Texas, and assumed to preside over, and hold court for said Criminal District Court of Dallas County, Texas, and to preside over the trial of this petitioner in this cause. Upon the call of this cause for trial, and before any announcement of ready had been had or plea taken, herein, your petitioner, in limine, duly filed and presented to said judge his objections to being tried in said court at said time and before the said Judge Stout so assuming to preside over said trial, because of said vacancy in said office of judge of said court, and because said presiding judge of said First Administrative Judicial District had no legal authority to assign said judge to preside in the event of a vacancy caused by the death of the judge of said court; but such authority to fill said vacancy under the Constitution of Texas rested solely with the Governor of Texas. Upon a hearing of said objections the facts relative to the death of Judge Adams, the failure of the governor to fill the vacancy, and the assignment of Judge Stout to preside over the Criminal District Court of Dallas County, Texas, by the presiding judge of the First Administrative Judicial District of Texas, were duly stipulated in the record in this cause. (R. 47.) These objections were overruled by said acting judge, and this cause proceeded to trial before said acting judge. To this ruling the petitioner duly excepted. (R. 44 to 47.)

Thereupon the case was tried to a jury which resulted in a verdict of conviction with the penalty assessed at death, Petitioner duly appealed from said judgment of conviction to the Court of Criminal Appeals of Texas, which court affirmed the judgment of the court below, and overruled this petitioner's motion for a rehearing. See judgment of affirmance (R. 96), and order overruling motion for rehearing (R. 103). Also, *Akins v. State*, 182 S. W. (2d) 723-4.

ASSIGNMENTS OF ERROR

FIRST

The judgment of the Court of Criminal Appeals of Texas in affirming the judgment of the Criminal District Court of Dallas County, Texas, in this cause, and in overruling this petitioner's motion to quash the indictment in this cause is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and violated the rights of this petitioner under said amendment in that in the formation of the grand jury that returned the bill of indictment herein there was discrimination against this petitioner and the members of the negro or African race on account of race and color, and this petitioner was thereby denied the equal protection of the law guaranteed him under said amendment to the Constitution of the United States.

SECOND

Said judgment of the Court of Criminal Appeals of Texas in affirming the Criminal District Court of Dallas

County, Texas, in this cause in overruling this petitioner's motion to quash the indictment herein on account of racial discrimination against him and his race deprives this petitioner of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Constitution of the United States.

THIRD

The Honorable A. R. Stout, the judge of the Fortieth District Court of Texas in and for Ellis County, Texas, having no authority in law to preside as the judge of the Criminal District Court of Dallas County, Texas, in the trial of this cause, said trial and judgment rendered thereunder is a nullity, and the judgment of the Court of Criminal Appeals of Texas in affirming said purported judgment, and said purported judgment, do not constitute due process of law, and thereby this petitioner is being deprived of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of the Fifth Amendment to the Constitution of the United States.

Authorities under the First and Second Assignments of Error

Constitution of the United States, Sec. 1 Fourteenth Amendment;

Constitution of the United States, Fifth Amendment;

Hill v. Texas, 316 U. S. 400, 62 Sup. Ct. Rep. 1048;

Akins v. State (*Texas*), 167 S. W. (2d) 758;

Pierre v. Louisiana, 306 U. S. 370, 59 Sup. Ct. Rep. 536;
Neal v. Delaware, 103 U. S. 370;
United States Ex Rel Jackson et al. v. Brady, Warden, 133 Fed. (2d) 476;
Norris v. Alabama, 294 U. S. 598, 55 Sup. Ct. Rep. 579;
Lane v. Wilson, 307 U. S. 368, 50 Sup. Ct. Rep. 872;
Guinn et al. v. U. S., 238 U. S. 347, 55 Sup. Ct. Rep. 926.
Myers v. Anderson, 238 U. S. 368, 55 Sup. Ct. Rep. 932;
Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687;
Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. Rep. 338;
Smith v. State (Texas), 77 S. W. Rep. 453.

Argument under First and Second Assignments of Error

The record in this cause as shown in the testimony of Carl F. Barth as contained in petitioner's Bill of Exceptions No. 1 (R. 34 and 35) shows that, according to the United States Census of 1940 the white population of Dallas County, Texas, was 336,851, and the negro population of said county was 61,605. It was further shown that of the negro population in Dallas County approximately 95% of them can read and write. (R. 35 to 39.) A large per cent of the negro population of the county own real estate either in the county or in the State of Texas. (R. 39, 40 and 41.) Among this population were preachers, teachers, merchants, insurance men, brokers, lawyers, physicians and tradesmen and laborers. Of this 61,605 a substantial percentage

are legally qualified to serve as grand jurors in Dallas County.

The testimony given under the petitioner's motion to quash the indictment, as shown by his Bill of Exceptions No. 1 in the Transcript of the Record herein (R. 23 to 42) shows that prior to the October Term, 1942 of the Criminal District Courts of Dallas County, Texas, there had never been a negro, or member of the African race to serve on a grand jury in Dallas County, Texas. That after this court reversed the case of *Hill v. Texas*, in June, 1942, one negro was put on the grand jury for the October Term, 1942 of said courts, and one, to-wit, C. D. Johnson, was put upon the grand jury for the January Term, 1943 of the Criminal District Court of Dallas County, Texas, which was the grand jury that returned the bill of indictment against this petitioner in this cause. The grand jury commissioners who selected the grand jury panel of sixteen men from which the grand jury was selected for said January, 1943 term, were W. H. Wells, Roy E. Douglas and Ernest R. Tennant. (R. 28.)

As to the method of selecting a member of the negro race on the grand jury panel each of said commissioners testified. W. H. Wells testified: "We were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, if I recall, they had not been discriminating for selection of the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so it would be clear." (R. 26.) Again he said "We had no intention of placing more than one

negro on the panel. When we had done that we had finished with the nergo. That was the suggestion of the others, and what Judge Adams thought about the selection of the grand jury." (R. 26.) "Judge Adams had suggested that a negro be selected on it." (R. 27.)

Ernest R. Tennant testified: "We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list." (R. 28-29.)

Roy E. Douglas testified: "At that time Judge Adams, the judge of this court, made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury." (R. 32.) Again he said, "Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right. No, I did not have any intention of placing more than one negro on the grand jury." (R. 32.)

Your petitioner respectfully submits that the testimony of these three commissioners shows that they were advised, and had in mind, the decisions of this court with reference to racial discrimination in the selection of the grand jury panel, and that their acts in the premises was a subtle and artful attempt to evade the law, and was not a bona fide attempt to comply with the law as announced by this court in the authorities cited, and especially with reference to the Hill case that was then fresh in their minds

and was the moving cause prompting their acts in the premises as well as the admonitions of the judge of the lower court.

In the case of *Smith v. Texas*, 311 U. S. 128, this court said:

> "Officers of a State tribunal may not cover up their intended discrimination against the negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment."

That case further holds that:

> "If there has been discrimination, whether accomplished ingeniously or uningeniously, the conviction can not stand."

In the case of the *United States ex rel Jackson v. Brady, Warden*, 133 Fed. (2d) 476, Mr. Justice Roper of the Circuit Court of Appeals for the Fourth Circuit, speaking for the court, says:

> "In each district where there is a large negro or other minority racial group the problem of selecting a suitable number of qualified representatives of that race is one that should receive the careful consideration of the clerk and jury commissioners. The constitution together with the statutes and decisions make it evident that anything that amounts to a conscious and deliberate exclusion from jury lists or representatives of any class of persons on account of race, color, economic or social status is improper and may be unlawful. The selection of qualified persons to give adequate representation of certain groups may in some districts present difficulties. Nevertheless no jury panel can be regarded as secure from challenge unless there has been an earnest effort on the part of the court, the clerk and the jury commissioners to assure that there is no discrimination against these groups.

"Since the Scottsboro cases it has been the practice in several courts to include in the jury boxes the names of a few negroes to avoid the violation of the Fourteenth Amendment. The validity of this method may be questioned in the light of the Supreme Court's language in the case of Smith v. Texas, 1940, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

"In the last mentioned case, which considered the composition of the grand jury challenged by one convicted of crime, the number of negroes called for service and actually permitted to serve for a long time had been so scanty as to compel the conclusion that negroes had been arbitrarily and systematically excluded because of their race. In the pending case, considering the number of jurymen in service in Baltimore during a long period of years with the substantial size of the negro population, and taking this fact separate and apart from the surrounding circumstances, one might be disposed to infer that an intentional and systematic effort had been made to cut down the number of negro jurymen in such a fashion as to create the superficial appearance of obeying the constitutional mandates while actually ignoring them."

In the case of *Lane v. Wilson*, cited above, this court, in a case involving the application of the Fifteenth Amendment to the Constitution, with reference to the right of suffrage, uses this language which we think pertinently applicable to the case at bar,

"The amendment nullified sophisticated as well as simple minded modes of discrimination."

In *Pierre v. Louisiana*, cited above, this court uses this language:

"Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied equal protection of his country's laws on ac-

count of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

In *Norris v. Alabama*, cited above, this court also said:

"When a Federal right has been specially set up and claimed in a State court, it is our province to inquire not merely whether it was denied in express terms, or whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights."

Your petitioner most respectfully asks that this Honorable Court so examine into the facts as contained in his record herein, and insists that same will disclose a subtle, artful and tactful discrimination against him and his race on account of color, and was but a "thin veneer of compliance", but an evasion of "the prohibition of the Fourteenth Amendment."

Authorities under the Third Assignment of Error

Constitution of the United States, Fourteenth Amendment, Sec. 1;
Constitution of the United States, Fifth Amendment;
Constitution of Texas, Article 1, Sec. 19;
Constitution of Texas, Article 5, Sec. 28;
Constitution of Texas, Article 5, Sec. 7;
Cooley's Constitution, 5th Ed., Chap. V., p. 107;
Cooley's Constitution, 5th Ed., Chap. IV. p. 78;
Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108-1114;

Revised Civil Statutes of Texas, Article 200-a, Sec. 5;
Pierson v. State (Texas), 177 S. W. (2d) 975;
Devoy v. New York, 35 Barb. 264;
People v. Raymond, 37 N. Y. 428;
People v. Blake, 40 Barb. 9;
People v. Albertson, 55 N. Y. 50;
State v. Goldstucker, 40 Wisconsin 124;
Mason v. Woerner, 16 Missouri 567;
Hobart v. Hobart, 45 Iowa 501;
Levy v. Bigelow, 6 Indiana Appeals, 677;
In re Terrell, 34 Pacific Rep. 457; 52 Kansas 29;
People v. Opel, 58 N. E. Rep. 996; 188 Illinois 194.

Statement and Remarks under Third Assignment of Error

By stipulations embodied in petitioner's Bill of Exceptions No. 2 (R. 47), and the stipulations embodied in petitioner's Bill of Exceptions No. 3 (R. 49 and 50), the following facts were ascertained and admitted:

That the regularly elected, qualified and acting judge of the Criminal District Court of Dallas County, Texas, Judge Grover C. Adams, died on August 25, 1943, during a former term of said court. That there was thereby created a vacancy in the judgeship of said court. That no successor of said judge has been appointed by the Governor of the State of Texas, to fill said vacancy caused by the death of Judge Adams. Judge A. R. Stout, the district judge for the 40th District of Texas, for Ellis County, Texas, presided in said court and on the trial of this cause by virtue of an assignment by Judge Claude M. McCallum, judge of the 101st District Court in and for Dallas County, Texas,

and acting as the presiding judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas. That the term of said court at which this cause was tried was the October Term, A. D. 1943, which convened on October 4, 1943, if same was ever in reality convened.

The Constitution of Texas, Article 5, Section 28, provides the only method by which a vacancy in the office of a judge of a district court shall be filled, which is as follows: "Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts *shall* be filled by the governor until the next succeeding general election". From this it is clear the people of Texas by their constitution delegated to the governor alone the power to fill vacancies, temporarily, in the offices of the judges named, and entrusted that power to no other person or body, not even to the legislature. No power is given the legislature at all in this matter, either to act itself or authorize any other officer to act in the premises. *Cooley's Constitutional Limitations*, 5th Ed., Chap. V, on page 107, says: "Every positive declaration contains an implication against anything contrary to it, or which would frustrate or disappoint the purposes of it". Again, the same author, in the same volume, in Chapter IV on page 78, further says: "Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is implied against legislative interference to add to the condition or extend the penalty to other cases."

The case of *State v. Goldstucker*, 40 Wisconsin 124, cited above, holds that "the legislature cannot provide for the choice of officers a different mode from that prescribed by the constitution."

The *Constitution of Texas*, Article 5, Sec. 7, cited above, confers on the legislature the right to provide for the holding of a district court "when the judge thereof is absent, or is for any cause disabled or disqualified from presiding"; but it does not provide for filling vacancies in the office of the judge. The legislature has acted under this constitutional grant of power and provided for the election of a special judge by the lawyers, and for the exchange of benches by judges. It also, by Article 200-a of the *Revised Civil Statutes of Texas*, has created Administrative Judicial Districts in Texas; and Section 5 thereof, as originally enacted, provides that "Judges may be assigned in the manner herein provided for the holding of district courts when the regular judge thereof is absent or is from any cause disabled or disqualified from presiding, and in instances where the regular judge is present or himself trying cases where authorized or permitted by the constitution and laws of the State". The 48th Legislature of Texas, in 1943, however, amended said Section 5 of said Article 200-a by adding thereto the following: "And judges may also be assigned in the manner herein provided for the holding of a district court when, by reason of the death, resignation, or from any cause whatsoever, the office of the district judge of the district is, or has become vacant". It was by virtue of this amendment that the presiding judge of the First Administrative Judicial District of Texas as-

signed Judge Stout to preside as judge of the Criminal District Court of Dallas, County, Texas upon the trial of this cause. Petitioner insists that said amendment is in violation of the Constitution of Texas cited above, and is wholly unconstitutional and void and conferred no authority upon said presiding judge or upon said Judge Stout to act in the premises.

In the case of *Pierson v. State*, 177 S. W. (2d) 975, this issue was involved based upon similar circumstances. In that case our Court of Criminal Appeals held that it was not the purpose of the legislature in enacting said amendment to provide for the filling of the vacancy in the judgeship caused by death, resignation, etc. Yet, the intention of the legislature in said matter is clearly shown by the "Emergency Clause" to said amendment, which is as follows: The fact that no clear provision of law exists at the present time to authorize the assignment of a district judge to FILL A VACANCY IN CASE OF DEATH, resignation or for other reasons, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended, and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted". Petitioner submits that, the opinion of the Court of Criminal Appeals in the *Pierson case* cited above to the contrary notwithstanding, the legislature in passing this amendment undertook to do that which the people by their Constitution had delegated solely

to the governor, and that this amendment is unconstitutional and void and conferred no legal authority upon the presiding judge of the First Administrative Judicial District to assign Judge Stout to preside over the trial of this cause; nor upon Judge Stout to preside over the Criminal District Court of Dallas County or upon the trial of your petitioner herein, and that his acts in so doing were void. That by reason thereof your petitioner is being deprived of his life without due process of law in violation of his constitutional rights.

This court in the case of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108 (on p. 1112) says:

> "No judgment of a court is 'due process of law' if rendered without jurisdiction in the court or without notice to the party.
>
> "The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Fields, speaking for this court, 'means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.' Tested by this rule petitioner was not given a trial by due process of law. There was no legal court.*"

In the *Pierson case*, cited above, the Court of Criminal Appeals in passing on the identical question raised here said: "Appellant correctly asserts that the power to appoint a successor to a deceased district judge lies exclusively

with the governor of the State. The Constitution expressly so provides. It is also true that the governor has not seen proper to appoint a successor to Judge Adams, and the office of Judge of the Criminal Court of Dallas County is now vacant." It further says, with reference to the judges so assigned that they "did not relinquish the offices they held, nor did they attempt to qualify as the successor to Judge Adams. *They did not purport to act as judge de jure or de facto of the Criminal District Court of Dallas County.*" If that is true, the petitioner is in the anomolous situation of having been tried before a tribunal without a judge, either de jure or de facto, presiding; the office of judge of that tribunal being vacant. That such is not a court, we submit, is evident.

In the cases of *Mason v. Woerner*, 18 Missouri 567, and *Hobart v. Hobart*, 45 Iowa 501, and *Levy v. Bigelow*, 6 Indiana Appeals 677, cited above, the definition of a "court" given by Mr. Bouvier, is expressly approved. Mr. Bouvier defines a "court" to be "an incorporeal political being which requires for its existence the judges, or a competent number of them, and a clerk or prothonotary, at the term during which, and at the place where, it is by law authorized by law to be held, and the performance of some public act indicative of a desire to perform the functions of a court. In another sense, the judges, clerk or prothonotary, counsellors, and ministerial officers are said to constitute a 'court'."

In the cases of *Re Terrell*, 34 Pacific Rep. 457; 52 Kansas 29, and *People v. Opel*, 58 N. E. Rep. 996; 188 Illinois 194, cited above, it is held that:

> "The judge is an essential constituent of a court, and there can be no 'court' in the absence of the judge or judges."

And

> "A court can have no existence without a judge."

And

> "It has been said that a 'court' is an incorporeal being which requires for its existence the presence of the judge."

Your petitioner most respectfully insists that he was tried in this cause before a body that was not a "court" in law by reason of the unfilled vacancy in the office of the judge of said court, and presided over by a judge of another court acting not as the judge de jure nor de facto of said court, and whose assignment thereto was not by any legal authority. That the proceedings do not constitute due process of law as guaranteed him under the Constitution of the United States, and he is being deprived of his life without due process of law, in violation of the Constitution of the United States and of the State of Texas.

For the foregoing reason your petitioner most respectfully prays that this Honorable Court reverse the judgments of the Court of Criminal Appeals of Texas and of the Criminal District Court of Dallas County, Texas, and hold same for naught; and that this cause be remanded to

the Court of Criminal Appeals of Texas for further orders in accordance with the judgment of this court herein.

Respectfully submitted,

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I hereby certify that I have this, the 23rd day of April, 1945, by due course of mail served a copy of the foregoing brief on the Attorney General of Texas, the attorney for the respondent herein.

A. S. Baskett

Attorney for the Petitioner.